DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

Civil Remedies Division

In the Case of:	)	
	)	
Kenneth Behymer, M.D.	)	DATE: March 6, 1990
	)	
Petitioner	)	
	)	
- v. -	)	
	)	Docket No. C-140
The Inspector General.	)	
	)	DECISION CR 73

DECISION

By letter dated May 18, 1989, the Inspector General (the I.G.) notified Petitioner that he was being excluded from participation in Medicare and any State Health care program for five years.[1] Petitioner was advised that he was being excluded because he had been convicted of a criminal offense related to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Petitioner was advised further that his exclusion was authorized by section 1128(b)(3) of the Social Security Act.

Petitioner timely requested a hearing, and the case was assigned to me for a hearing and a decision. I held a hearing in Anchorage, Alaska, on November 30, 1989.

I have considered the evidence introduced by both parties at the November 30 hearing. Based on the evidence and applicable law, I conclude that the five year exclusion imposed against Petitioner is excessive. I conclude that the remedial considerations of section 1128 of the Social

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[1] "State health care program" is defined by section 1128(h) of the Social Security Act to include any State Plan approved under Title XIX of the Act (such as Medicaid). I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

Security Act will be served in this case by an 18 month exclusion. I modify the exclusion accordingly.

ISSUE

The issue in this case is whether the exclusion imposed and directed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner is a physician who has specialized in internal medicine. Tr. at 121.[2]

2. On October 14, 1987, Petitioner was indicted in the United States District Court for the District of Alaska (the District Court) on seven counts of unlawful distribution of a controlled substance in violation of 21 U.S.C. 841(a)(1), and on one count of obtaining a controlled substance by fraud in violation of 21 U.S.C. 843(a)(3). I.G. Ex. 1.

3. On March 18, 1988, Petitioner pleaded nolo contendere to Count VII of the indictment, a charge of unlawful distribution of a controlled substance. I.G. Ex. 2/1.

4. Petitioner was convicted of knowingly distributing or dispensing 72 dosage units of Methadone, a Schedule II controlled substance, by prescription, to a patient, for other than legitimate medical reasons. I.G. Ex. 1/4.

5. On March 18, 1988, the District Court dismissed the seven remaining counts of the indictment. I.G. Ex. 2/2.

6. The District Court sentenced Petitioner to probation for two years and to a special assessment of $50.00. I.G. Ex. 2/1-2.

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[2] The parties' exhibits and the transcript of the hearing will be cited as follows:

I.G.'s Exhibit	I.G. Ex.
Petitioner's Exhibit	P. Ex.
Transcript	Tr.

7. The District Court conditioned Petitioner's probation on the requirement that he adhere to specified conditions concerning the manner in which he prescribed controlled substances. I.G. Ex. 2/1-3.

8. Petitioner had previously been convicted in 1978 of conspiracy and unlawful distribution of Schedule II controlled substances, pursuant to 21 U.S.C. 841 and 21 U.S.C. 846. I.G. Ex. 7B.

9. Subsequent to Petitioner's 1988 conviction, an action was brought before the Medical Board of the Alaska Department of Commerce and Economic Development, Division of Occupational Licensing (Alaska Medical Board), to revoke, suspend, or impose other sanctions against Petitioner's license to practice medicine in Alaska. I.G. Ex. 7.

10. Petitioner was charged before the Alaska Medical Board with unlawful or improper prescribing of controlled substances, gross negligence, and repeated negligent conduct. I.G. Ex. 7/6-7.

11. On May 23, 1989, an administrative hearing officer (hearing officer) issued a proposed decision in Petitioner's case before the Alaska Medical Board. I.G. Ex. 7.

12. The proposed decision concluded that Petitioner: unlawfully prescribed and dispensed drugs; was grossly negligent and incompetent in the prescribing of scheduled narcotic drugs; and was addicted to or severely dependent on Paregoric, a controlled substance. I.G. Ex. 7/54.

13. On May 23, 1989, the Alaska Medical Board adopted the hearing officer's proposed findings and suspended Petitioner's license to practice medicine for a period of 60 days. I.G. Ex. 7/55-56.

14. The Alaska Medical Board permanently prohibited Petitioner from prescribing Schedule II and Schedule III controlled substances. I.G. Ex. 7/55-56.

15. Petitioner's 1988 conviction was a consequence of his prescribing Methadone to a pregnant woman whom Petitioner believed to be addicted to heroin. I.G. Ex. 18; Tr. at 122-124.

16. Petitioner's decision to prescribe Methadone to this individual was motivated by humanitarian considerations. I.G. Ex. 18; Tr. at 122-124.

17. Petitioner did not profit from the conduct which resulted in his 1988 criminal conviction, nor did his conduct cause injury to another person. Tr. at 81.

18. The I.G. did not prove that Petitioner committed any crimes other than those of which he was convicted. See I.G. Ex. 1.

19. Beginning in August 1989, Petitioner received treatment for substance abuse problems. Tr. at 127.

20. Petitioner completed both in- and out-patient therapy programs for substance abuse. Tr. at 127.

21. Petitioner continues to attend meetings of Alcoholics Anonymous. Tr. at 127.

22. Subsequent to Petitioner's 1988 conviction, over 4,000 of Petitioner's prescriptions were monitored by federal authorities and no improprieties were detected. Tr. at 82.

23. Petitioner has not repeated the conduct which resulted in his 1988 conviction. Finding 22; Tr. at 83.

24. Petitioner was convicted of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. Findings 2-8.

25. The criminal offense of which Petitioner was convicted is a criminal offense as described in section 1128(b)(3) of the Social Security Act. Social Security Act, section 1128(b)(3).

26. The Secretary of the Department of Health and Human Services (the Secretary) has authority to impose and direct an exclusion against Petitioner from participating in Medicare and Medicaid, pursuant to section 1128(b)(3) of the Social Security Act. Social Security Act, section 1128(b)(3).

27. The Secretary delegated to the I.G. the duty to impose and direct exclusions pursuant to section 1128 of the Social Security Act. 48 Fed. Reg. 21662 (May 13, 1983).

28. On May 18, 1989, the I.G. notified Petitioner that he was being excluded from participation in the Medicare and Medicaid programs as a result of his conviction of a criminal offense relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance. I.G. Ex. 9.

29. Petitioner was notified that he was being excluded for five years pursuant to section 1128(b)(3) of the Social Security Act. I.G. Ex. 9.

30. The exclusion provisions of section 1128 of the Social Security Act establish neither minimum nor maximum exclusion terms in those circumstances where the I.G. has discretion to impose and direct exclusions. Social Security Act, section 1128(b)(1)-(14).

31. A remedial objective of section 1128 of the Social Security Act is to protect program beneficiaries and recipients by permitting the Secretary (or his delegate, the I.G.) to impose and direct exclusions from participation in Medicare and Medicaid of those individuals who demonstrate by their conduct that they cannot be trusted to provide items or services to program beneficiaries and recipients. Social Security Act, section 1128.

32. An additional remedial objective of section 1128 of the Social Security Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs. Social Security Act, section 1128.

33. Petitioner was convicted of a serious criminal offense. Findings 2-8; See 42 C.F.R. 1001.125(b)(1).

34. Petitioner's unlawful conduct did not have an adverse impact on his patients or on program beneficiaries or recipients. Findings 16-17; See 42 C.F.R. 1001.125(b)(2).

35. Petitioner's unlawful conduct was not intended to cause harm to patients or to the integrity of the Medicare and Medicaid programs. Findings 16-17; See 42 C.F.R. 1001.125(b)(4).

36. Petitioner's substance abuse disorder and his negligence in prescribing controlled substances jeopardized the welfare of his patients and posed a

threat to the integrity of the Medicare and Medicaid programs. Findings 12-13; See 42 C.F.R. 1001.125(b)(2), (b)(6).

37. Petitioner's adherence to a treatment program for substance abuse minimizes the possibility that he will again abuse controlled substances or alcohol. Findings 21-22; See 42 C.F.R. 1001.125(b)(4), (b)(6).

38. The restrictions against Petitioner prescribing controlled substances imposed by the Alaska Medical Board minimize the possibility that in the future he will negligently prescribe controlled substances to his patients. Finding 14; See 42 C.F.R. 1001.125(b)(4), (b)(6).

39. Petitioner's prescription practices since his 1988 conviction demonstrate that he is unlikely to negligently prescribe controlled substances to his patients. Finding 22; See 42 C.F.R. 1001.125(b)(4), (b)(6).

40. The five year exclusion imposed and directed against Petitioner is excessive. Findings 31-39.

41. The remedial considerations of section 1128 of the Social Security Act will be served in this case by an 18 month exclusion.

ANALYSIS

Petitioner was convicted of unlawful distribution of a controlled substance in violation of 21 U.S.C. 841(a)(1). There is no question that this conviction is related to the unlawful distribution of a controlled substance within the meaning of section 1128(b)(3) of the Social Security Act. Therefore, the I.G. was authorized to exclude Petitioner from participating in Medicare and Medicaid. What remains to be decided is whether the five year exclusion imposed against Petitioner by the I.G. is reasonable.

The exclusion law was enacted by Congress to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect program recipients and beneficiaries from individuals who have demonstrated by their behavior that they cannot be entrusted with the well-being and safety of recipients and beneficiaries.

There are two ways that exclusions imposed and directed pursuant to this law advance the remedial purpose. First, the law protects recipients and beneficiaries from untrustworthy providers until they can be trusted to serve program recipients and beneficiaries. Second, exclusions function as examples to deter providers of items or services from engaging in conduct which threatens the well-being and safety of recipients and beneficiaries. See House Rep. No. 95-393, Part II, 95th Cong., 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News, 3072.

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places the well-being and safety of recipients and beneficiaries ahead of the pecuniary interests of providers. Thus, in determining the reasonableness of an exclusion, the primary consideration must be the degree to which the exclusion serves the law's remedial objectives. An exclusion is not punitive if it does reasonably serve these objectives, even if it has a severe adverse impact on the person against whom it is imposed.

In order to decide whether an exclusion is reasonable in a particular case, I must judge the exclusion in light of the evidence in the case and the intent of the exclusion law. The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose.

The hearing is, by law, de novo. Social Security Act, section 205(b). Evidence which is relevant to the reasonableness of an exclusion will be admitted in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at an exclusion hearing, even if it relates to conduct other than that which triggered the statutory authority to exclude a petitioner. Thus, I admitted evidence in this case relating to Petitioner's substance abuse problems and his negligently prescribing controlled substances, even though that evidence was not evidence pertaining to the criminal conviction which authorized the I.G.'s exclusion of Petitioner. Similarly, I allowed evidence as to a prior conviction of Petitioner for a criminal

offense relating to the unlawful dispensing of a controlled substance. Also, I admitted evidence pertaining to the Petitioner's motives for engaging in the conduct which resulted in his 1988 criminal conviction and his post-conviction efforts at rehabilitation.

The Secretary has adopted regulations to be applied in exclusion cases. The regulations specifically apply only to exclusions for "program-related" offenses (convictions for criminal offenses relating to Medicare and Medicaid). However, they do express the Secretary's policy for evaluating cases where permissive exclusions may be appropriate. Thus, the regulations are instructive as broad guidelines for determining the appropriate length of exclusions in cases where the Secretary has authority to exclude individuals and entities. The regulations require the I.G., in determining exclusions, to consider factors related to the seriousness and program impact of the offense and to balance those factors against any mitigating factors that may exist. 42 C.F.R. 1001.125(b)(1)-(7).

An exclusion determination will be held to be reasonable where, given the evidence of the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (Jan. 27, 1983) Should I determine that an exclusion is unreasonable, I have authority to modify the exclusion, based on the law and the evidence. Social Security Act, section 205(b).

There is no question that Petitioner engaged in conduct which, were it to continue, would pose a serious threat to the integrity of the Medicare and Medicaid programs. The evidence establishes that Petitioner not only abused controlled substances, but that he was negligent in prescribing and dispensing them. His misconduct was so serious that the Alaska Medical Board suspended his license to practice medicine and permanently prohibited him from prescribing Schedule II and Schedule III controlled substances. I conclude that this misconduct, coupled with Petitioner's conviction for unlawful distribution of a controlled substance, gave the I.G. reasons to conclude that a substantial exclusion was needed to protect the welfare of program beneficiaries

and recipients and the integrity of the Medicare and Medicaid programs. See 42 C.F.R. 1001.125(b)(6).

However, I conclude that the five year exclusion imposed and directed against Petitioner is excessive, when considered in light of the evidence in this case. A five year exclusion is not needed here to protect program beneficiaries or recipients or to protect the integrity of federally funded health care programs. And, although a five-year exclusion arguably would stand as a strong deterrent against other individuals engaging in the conduct engaged in by Petitioner, an exclusion of that length is unreasonable, given the mitigating circumstances present here.

The evidence establishes that Petitioner's unlawful conduct which resulted in his 1988 conviction was not motivated by self-interest, but rather by humanitarian concern for the well-being of a patient and her unborn child. The evidence establishes that Petitioner was referred a patient who was pregnant and who told Petitioner that she was a heroin addict. Petitioner unsuccessfully attempted to enroll his patient in a Methadone maintenance program. Frustrated by what he saw as an unreasonable refusal to admit the patient, Petitioner unlawfully prescribed Methadone to her. The conduct which resulted in Petitioner's conviction was therefore not conduct which adversely affected Petitioner's patient or which would have adversely affected program recipients and beneficiaries. See 42 C.F.R. 1001.125(b)(2).

The record also establishes that Petitioner's criminal conduct was an isolated episode. It was of short duration. Petitioner was not sentenced to incarceration by the District Court. See 42 C.F.R. 1001.125(b)(5).

There are mitigating circumstances in this case. See 42 C.F.R. 1001.125(b)(4). I am persuaded that there is little likelihood that Petitioner will again engage in negligent prescribing of controlled substances or abuse controlled substances. Petitioner's authority to prescribe Schedule II and Schedule III controlled substances was revoked by the Alaska Medical Board, thereby sharply curtailing, if not totally precluding, his access to these medications. He has written more than 4,000 prescriptions since his conviction and these have been scrutinized by federal authorities. These prescriptions have not evidenced any irregularities of the kind manifested prior to Petitioner's 1988

conviction. Petitioner has, since his 1988 criminal conviction, completed in- and out-patient treatment for substance abuse and is an active participant in Alcoholics Anonymous.

My conclusion as to Petitioner's trustworthiness relies in large respect on the testimony of Petitioner's federal probation officer, Mr. Joseph Kolodji. See Tr. at 77-90. Mr. Kolodji's job requires him to make judgments and recommendations concerning the probity and trustworthiness of individuals. He has worked closely with, and carefully supervised, Petitioner. He had nothing to gain by testifying in Petitioner's support. Mr. Kolodji's assessment that there was little likelihood that Petitioner would repeat his past misconduct must therefore be given considerable credence.

The I.G. notes that Congress mandated a minimum five year exclusion for individuals convicted of criminal offenses relating to the delivery of an item or service under Medicare or Medicaid or for patient abuse or neglect. The I.G. contends that the offense upon which Petitioner's exclusion is premised is of greater seriousness than offenses for which Congress mandated minimum five year exclusions. Therefore, according to the I.G., an exclusion of Petitioner for any period less than five years will be inconsistent with Congressional intent.

It is legitimate to compare cases for which exclusions are permitted with those for which the exclusion is mandated. If a case involves similar conduct to that which mandates at least a five year exclusion, or if the conduct poses an equal or greater threat to the integrity of federally-funded health care programs than conduct which mandates at least a five year exclusion, then it would be inconsistent with Congressional intent to impose an exclusion for less than five years.

On the other hand, the fact that Congress did not mandate a minimum exclusion in those cases where exclusions are permitted by law, means that Congress did not conclude that any minimum exclusion period was necessarily required in such cases. Congress intended that each permissive exclusion case be evaluated based on its facts and that exclusions be tailored to serve the remedial purposes of the law.

I do not agree with the I.G.'s argument that Petitioner's offense was of greater seriousness than those offenses

for which a five year minimum exclusion is mandated. The evidence pertaining to this offense shows that Petitioner's conduct, while illegal, was motivated by altruism. That cannot generally be said about offenses related to the delivery of an item or service under Medicare or Medicaid. It certainly cannot be said about crimes of patient neglect or abuse.

The I.G. also argues that if I apply the reasoning I used to sustain the exclusions imposed in the cases of Leonard N. Schwartz, R. Ph., DAB Civ. Rem. C-62 (1989), and Bernard Lerner, M.D., DAB Civ. Rem. C-48 (1989), to the present case, then I must sustain the exclusion imposed here. I disagree.

The petitioner in Schwartz was a pharmacist convicted of failure to maintain records pertaining to the sale, during a 16 month period, of more than 34,000 tablets of Preludin, a Schedule II controlled substance. He admitted that he had sold many Preludin tablets without receiving prescriptions for them. As a consequence of his conviction, he was sentenced to a period of incarceration plus five years probation. I sustained an eight year exclusion in that case, based in part on the seriousness of the petitioner's criminal misconduct, but also based on my conclusions that the petitioner's conduct had been motivated by personal gain and that the petitioner had not proven that he could be trusted to deal with program recipients and beneficiaries.

The petitioner in Lerner was a physician convicted of 163 counts of knowingly, willfully, and unlawfully obtaining and possessing controlled substances. The evidence established that the petitioner had for many years been addicted to Dilauded, a Schedule II controlled substance. In order to obtain Dilauded, the petitioner issued prescriptions for this medication to patients who turned back some of the drug to the petitioner. Some of these patients were individuals who had received treatment for drug addiction. One of these patients was a 15-year old female employed by the petitioner as a receptionist. As a consequence of his conviction, the petitioner was sentenced to a substantial period of incarceration, plus a lengthy period of probation.

I sustained a 15 year exclusion in Lerner based in some respects on the seriousness of the petitioner's criminal misconduct. However, there were other facts in that case upon which I premised my conclusion that a lengthy exclusion was needed to protect the integrity of

federally funded health care programs and their beneficiaries and recipients. The evidence in Lerner established that the petitioner had ignored repeated warnings from investigating authorities and had denied misconduct, even when faced with irrefutable evidence of it. The trial judge in the petitioner's criminal case found that the petitioner had lied in his testimony. The petitioner had withdrawn from substance abuse treatment programs prior to having completed them.

Based on this evidence, I concluded that the petitioner in Lerner had not established that he could be trusted to deal with program recipients and beneficiaries. I found that the risk to recipients and beneficiaries was so great, should the petitioner relapse, that the lengthy exclusion imposed by the I.G. was justified.

Schwartz and Lerner are distinguishable from the present case on several grounds. In both Schwartz and Lerner, the criminal misconduct upon which the exclusions were premised was motivated by considerations of personal gain. In the present case, Petitioner's unlawful conduct stemmed from his concern for the welfare of his patient. The criminal misconduct in Schwartz and Lerner was perpetrated over a protracted period of time. Here, the criminal misconduct involved an episode of brief duration. The seriousness of the misconduct in both Schwartz and Lerner is in some respects demonstrated by the fact that in both cases the petitioners were incarcerated. Here, no prison sentence was imposed on Petitioner.

However, the most important distinction between this case and Schwartz and Lerner is that, in this case, Petitioner offered convincing evidence as to his rehabilitation and trustworthiness to provide services to program recipients and beneficiaries. I was not persuaded by the evidence offered by the petitioners in Schwartz and Lerner.

The I.G. also argues that Petitioner's 1988 conviction is Petitioner's second conviction for unlawful distribution of a controlled substance. The evidence establishes that Petitioner had been convicted in 1978 of unlawful distribution of a controlled substance. I am persuaded by Petitioner's testimony that the conduct which resulted in that conviction manifested similar altruism to that which led to his 1988 conviction. Tr. at 125-126. The I.G. asserts that the evidence of Petitioner's prior conviction, when coupled with evidence of his 1988 conviction, is strong evidence of Petitioner's lack of

trustworthiness and establishes that the five year exclusion is reasonable.

Certainly, the fact that Petitioner had previously been convicted of the same type of offense of which he was convicted in 1988 is a fact which raises serious questions about Petitioner's trustworthiness to treat program recipients and beneficiaries. However, I conclude that Petitioner offered persuasive evidence that, notwithstanding what he may have done in the past, he is not likely to repeat that conduct in the future.

The remedial purposes of the exclusion law will be served in this case by an 18 month exclusion. An 18 month exclusion is not a brief exclusion. Petitioner will not be eligible to apply for reinstatement as a Medicare or Medicaid provider until late in 1990. The 18 month exclusion period will provide a sufficient period of time to test Petitioner's assurances that he will not abuse controlled substances again. It will also serve as a deterrent to others without being unreasonably punitive, given the evidence in this case.

CONCLUSION

Based on the law and the evidence in this case, I conclude that the five year exclusion imposed against Petitioner from participating in the Medicare and Medicaid programs is excessive and unreasonable. I modify the exclusion to an 18 month exclusion.

/s/

Steven T. Kessel
Administrative Law Judge